IN THE
Supreme Court of the United States
October Term, 1978

NO. 78-1418

WILLIAM E. BLOOMER, JR.,
Petitioner,

-against-

LIBERTY MUTUAL INSURANCE COMPANY, as subrogee of CONNECTICUT TERMINAL COMPANY,
Respondent.

Petitioner's Reply Brief

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PETITIONER'S REPLY BRIEF

POINT I

THE 1972 AMENDMENTS TO THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, 33 U.S.C. §901 ET SEQ., WERE NOT ENACTED IN RELIANCE ON THE FULL RECOUPMENT OF THE STEVEDORES' LIEN

Respondent cites *Edmonds v. Compagnie Generale Transatlantique,* ____U.S.____, 99 S. Ct. 2753, 61 L. Ed. 2d 521, for the proposition that "Once Congress has relied upon conditions that Courts have created, we are not as free as we would otherwise be to change them. A change in the conditions would effectively alter the statute by causing it to reach different results than Congress envisioned." (61 L.Ed.2d 521, 535).

Respondent also cites *Director, Office of Workers' Compensation Programs v. Rasmussen,* ____U.S.____, 59 L.Ed.2d 122, urging that an answer to the question presented in petitioner's favor " * * * would have this Court rewrite the legislation * * * ".

In the case at bar, however, Congress did not rely on the stevedores' recoupment of their entire lien when it amended the Longshoremen's and Harbor Workers' Compensation Act in 1972. In fact, there is nothing, eitner in the legisiative history or elsewhere, to show that Congress gave any consideration to the question presented whatsoever prior to the Amendment's passage. In any event the law applicable prior to 1972 was not uniform. (Compare *Ballwanz v. Jarka Corp.,* 382 F.2d 433 (4th Cir. 1967) with *Strachan Shipping Co. v. Melvin,* 327 F.2d 83 (5th Cir. 1964) and *Haynes v. Rederi A/S Aladdin,* 362 F.2d 345 (5th Cir. 1966), cert. denied, 1967, 385 U.S. 1020, 87 S. Ct. 731, 17 L. Ed. 2d 557).

As stated by Mr. Justice Blackwell in his dissenting opinion in the *Edmonds* case:

> "Congress had two narrow objectives in mind in enacting §905(b) in 1972; to overcome this Court's decision in Seas Shipping Co. v. Sieracki, 328 U.S. 25 (1946), and its decision in Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp., 350 U.S. 124 (1956). See S. Rep. No. 1125, 92d Cong., 2d Sess., 8-11 (1972)."

It was only when the amendments were in effect, and the Courts were faced with the problem of disbursing recoveries by longshoremen in third-party actions, that the inequity of allowing the stevedore to recoup its lien in full, in view of the changes wrought by the amendments, became apparent. *Swift v. Bolten,* 517 F.2d 368 (4th Cir. 1975)

POINT II

A COURT HEARING IN EACH CASE WOULD BE BURDENSOME AND UNNECESSARY.

In the case of *Bachtel v. Mammoth Bulk Carriers, Ltd.,* ____F. 2d____, decided August 20, 1979, the United States Court of Appeals for the Ninth Circuit came out strongly in favor of proportional sharing of attorney's fees and expenses.

On page 17 of the slip opinion, the Court stated:

> "After further analysis, *Mitchell* went on to recognize that while the pro-rata approach stated in *Swift* might be appropriate in many cases, it would not adopt it as a hard and fast rule. It suggested in some cases the recovery might be large enough so that the entire attorney fee should be paid by the injured person. The *Mitchell* court concluded by suggesting a "balancing" approach which would consider the reasonableness of the fees, the services rendered, and the equities involved.
>
> The Ninth Circuit has not spoken upon the problem. Upon reflection we forecast nothing but trouble and confusion in attempting to apply the *Mitchell* "balancing" formula. The guidelines are so vague that an appeal could be expected in a substantial number of the cases. The "Fund" approach stated in *Cella, Fontana,* and *Valentino* is unfair and in many instances would work a devastating hardship on the injured person. The *Swift* "pro-rata" formula is easy to apply and is completely in line with equitable principles as well as Congress' intent in adopting the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act. On this record, we adopt the *Swift* "pro-rata" rule as the law to be applied in the Ninth Circuit."

The fact that Congress in 33 U.S.C. §933(e) (employer initiated action) and in 33 U.S.C. §928 (contested compensation proceedings) required approval of attorney's fees does not evidence an intent by Congress that a Court hearing be required for approval of attorney's fees in third-party actions commenced by longshoremen.

These actions have been brought for many years without such hearings.

In some jurisdictions, the percentage amount of contingent fees is set by Court rule,[1] and in others, by custom.

These amounts are well known to stevedores and their attorneys. Unless the attorney for the longshoreman is charging a fee in excess of that customarily charged, or the attorney for the stevedore participated in the litigation, there is no need for any Court proceeding. A simple proportional sharing of the fees and expenses of litigation between the lienholder and the longshoreman is all that is required. *Swift v. Bolten,* 517 F.2d 368 (4th Cir. 1975); *Brown v. American Mail Line, Ltd.,* 437 F.Supp. 628 (DC Oregon 1977).

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1. Rule 603.7 of the Rules of the New York Supreme Court, Appellate Division, First Department, specifies the percentage amount that an attorney may charge as a contingent fee in a personal injury or wrongful death action. The Rule also states that the charging of an amount equal to or less than the schedule of fees set forth " * * * is deemed to be fair and reasonable." There are similar Rules in the other three Judicial Departments in New York State.

POINT III

THE DIRE CONSEQUENCES OF A DECISION IN PETITIONER'S FAVOR PREDICTED BY AMICUS, MASTER CONTRACTING STEVEDORE ASSOCIATION OF THE PACIFIC COAST, INC., WILL NOT MATERIALIZE.

(a) Contrary to amicus' contention, the question presented by petitioner applies to all recoveries by longshoremen, whether by judgment or settlement with or without the stevedore's consent.

If the case at bar had gone to trial and Mr. Bloomer had recovered a judgment of $60,000, Mr. Bloomer would still contend that Liberty Mutual Insurance Company should share proportionately with him the costs of effecting the recovery and the question presented would still be before this Court. The same would be true had Liberty Mutual Insurance Company consented to the settlement.

Considering, however, that the stevedore is no longer exposed to a judgment for indemnity (33 U.S.C. §905(b)) and that pursuant to the Second Circuit's decision in the instant case, the stevedore will recoup its entire lien from the longshoreman's recovery, written approval of the stevedore to settlement of a longshoreman's third-party action or, in fact, any sort of compromise by the stevedore concerning its lien, is difficult if not impossible to obtain. This is illustrated by the position taken by respondent prior to the settlement of the instant case in the District Court (R. 21).

(b) Proportional sharing of fees and expenses by those parties benefiting from the recovery will not provide an incentive for marginal third-party actions or for "quick money" settlements.

Petitioner does not want to enter into a philosophical or moral discussion of whether or not marginal litigation deserves consideration by the Court. Petitioner does suggest, however, that the decision by the Court in the instant case will have no effect upon the volume of litigation whatsoever.

If the longshoreman presents a situation wherein there is a reasonable chance of establishing the negligence of the shipowner and has an injury serious enough to support a recovery sufficiently large so that an attorney can earn a reasonable fee, an attorney will take the case. The fee will be the same whether there is proportional sharing of the fee by the lienholder or not (see footnotes 3 and 4 of petitioner's main brief, pages 7 and 8).

The fact that the attorney's fee remains the same, no matter what the outcome of the case, also disputes amicus' argument that a ruling in favor of petitioner would encourage "quick money" settlements.

The proposed question presented by amicus on page 8 of its brief also ignores this fact.

The suggestion by amicus on page 10 of its brief that the stevedore's lien should be the first charge against the recovery has no legal support, is outside the scope of the question presented, and, as no appeal was taken from that part of the judgment fixing the attorney's fees (R. 33), was not considered by the Circuit Court (A. 8). In any event, the suggestion would result in inequities. For example, if the recovery in the instant case remained at $60,000, but the lien were $50,000, pursuant to amicus' suggestion, the stevedore would recover its full $50,000 lien at no cost to it, and the attorney through whose effort this recovery was made would receive a fee of $3,333.00 paid by the longshoreman.

The suggestion by amicus on page 11 that a net recovery of $33,000 would have been sufficient to settle Mr. Bloomer's third-party action had there been no lien is unrealistic.

The measure of a settlement in any third-party action is what the parties and their attorneys are willing to agree upon in order to avoid the risk that they will do worse at the hands of a jury.

Even if there were no lien, Mr. Bloomer's case would still have been settled for $60,000 as a potential jury verdict could not be affected by the lien, one way or the other.

(c) Reversal of the Second Circuit's decision will not result in employers withholding compensation benefits.

Amicus suggests that employers, knowing that they will recoup only approximately two-thirds of their lien rather than the full lien upon the longshoreman's third-party action, will be reluctant to make compensation payments (p. 16 of amicus brief).

Carrying this suggestion one step further, the employer should be even more reluctant to make payments voluntarily when no third-party action at all is possible and there is no chance of recoupment.

As amicus correctly notes, since the 1972 Amendments eliminating recovery based on unseaworthiness, "the frequency of litigation has declined" and, obviously, the number of cases in which liens are recouped has declined.

With all due respect to amicus, it is unrealistic to presume that the few longshoremen who have third-party actions will be discriminated against because the compensation carrier will stand to only recover approximately two-thirds rather than the full amount of their compensation payments when, in the vast

majority of cases, no recoupment of compensation payments at all will be realized.

Respectfully submitted,

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